

Pepsi-Cola Company and Local 125, International Brotherhood of Teamsters, AFL-CIO. Case 22-CA-21941

January 26, 2001

**SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN**

On February 1, 2000, Administrative Law Judge Raymond P. Green issued the attached supplemental decision.¹ The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

¹ On January 10, 2000, the Board issued a Decision and Order in the above-captioned case. 330 NLRB 474. In its decision, the Board found it necessary to remand the proceedings to the judge for further findings and conclusions as to whether the Respondent unlawfully suspended and discharged employee and Shop Steward Sean Reilly because of his protected activity. Specifically, the Board found a remand necessary for the judge to make further findings, under the test set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), as to: (a) whether the Respondent had an honest belief that Reilly engaged in the misconduct attributed to him; and (b) if so, whether the General Counsel carried his burden of showing that Reilly did not engage in the misconduct. The judge's supplemental decision addresses the issues that were the subjects of the remand.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule the administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel also argues that even accepting the judge's credibility findings, Reilly did not engage in serious misconduct because his call for employees to engage in a partial work stoppage did not violate the contractual no-strike clause, which prohibited shop stewards from "tak[ing] strike action . . . except as authorized by official action of the Union." According to the General Counsel, the clause did not authorize the Respondent to discipline or discharge a shop steward for merely soliciting employees to engage in a strike. The General Counsel's argument was implicitly rejected by our remand for a *Burnup & Sims* analysis, which the judge found—and we adopted—as the appropriate analysis for determining the lawfulness of Reilly's discharge. Accordingly, the General Counsel's argument raises issues beyond the scope of the remand.

Member Liebman did not participate in the Board's prior decision remanding this proceeding to the judge for a *Burnup & Sims* analysis. She questions whether that analysis is correct because it rests on the premise that the contractual language constituted a clear and unmistakable waiver of Reilly's right to have such a discussion with employees about a possible strike. Nevertheless, she agrees with her colleagues that this issue is beyond the scope of the remand.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Tara Levy, Esq., for the General Counsel..

Richard R. Boisseau, Esq. and *G. Paris Sykes Jr.*, for the Employer.

James L. Linsey, Esq., for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me on February 17, 1999. On, April 15, 1999, I issued a Decision and Order finding that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Sean Reilly because of his activities on behalf of Local 125, International Brotherhood of Teamsters, AFL-CIO. I also concluded that the Respondent did not engage in unlawful surveillance. However, on January 10, 2000, the Board remanded this case to me for further findings and conclusions.

In the original decision I concluded that the legal standard applicable to this case was the one enunciated in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

Reilly was a shop steward at the Company's Piscataway facility, representing about 150 employees and a new labor agreement had been executed by the parties which engendered some dissatisfaction among some of the work force because of certain give-backs that were made.

On March 5, 1997, Reilly conducted a union meeting of Piscataway employees where some indicated that they did not wish to attend a Company-mandated meeting called the Upside Down meeting scheduled for March 10. That meeting was inconclusive, and Reilly asked and received permission from the Company to hold another meeting early on the morning of March 7, 1997.

The meeting on March 7, 1997, was held in a conference room located on the Company's premises and commenced at about 5:45 a.m. Reilly presided and employees expressed their views on whether to attend the Right Side Up meeting. Reilly testified that some employees stated that the group should not attend the meeting while others stated that they should. Reilly asserts that he did not express a position and denies that he urged any employees to boycott the meeting.

Dickinson, who arrived while the meeting was in progress, went into the copy room that abuts the conference room where the meeting was in progress. He testified that he overheard Reilly stating that unless an employee had an attendance problem, "I don't care if they fire me or sue me, there's no good reason to go to the meeting on Monday." According to Dickinson, he overheard Reilly saying that "we need action now," and that "we need unity." Dickinson also testified that after leaving and returning, he heard Reilly tell employees to call in sick so that they would not get in trouble and that he further heard Reilly warn employees that the Union would be watching who attended the Right Side Up meeting.

Based in large measure on demeanor considerations, Dickinson was, in my opinion, an honest witness. Therefore, I felt that he had an honest opinion that the statements he heard were

made by Reilly. He had dealings with Reilly in the past and was familiar with his voice. As Reilly was the shop steward and was conducting the meeting, I have no doubt that Dickinson, either consciously or unconsciously, associated the voice he heard with that of Reilly. Thus, in my opinion, Dickinson, had an honest subjective belief that the voice he heard was Reilly's and that it was Reilly who was making the statements which, in essence, could be construed as urging a boycott of the Right Side Up meeting. In this regard, I also note that there was no evidence of ill feeling between Dickinson and Reilly or any other evidence tending to show that Dickinson or the Company's management engaged in a plot to frame Reilly for something he didn't do.

I also noted that at the time that Dickinson overheard these remarks he was in another room, separated by a wall and was at least 50 feet away from where Reilly was standing. This therefore raised in my mind, the question of whether or not his honest belief was nevertheless reasonably based on objective facts. To put it another way, it certainly is possible and often occurs that people have honest beliefs which are nevertheless inaccurate, either because of bias, insufficient ability to perceive, failure of recollection or simple mistake. To my mind, the fact that I concluded that Dickinson had an honest belief that it was Reilly making the statements is not contradicted by the fact that Dickinson, because of his location, may very well have been mistaken.

In any event, the decision to discharge Reilly was not made by Dickinson. It was made by higher management after the Company made an investigation of the matter in an attempt to ascertain if it was Reilly who in fact urged employees to boycott the Right Side Up meeting. When initially confronted by Brian Semple about the meeting, Reilly said that it was none of his business. Thereafter, the Company tried to interview a number of employees who attended the meeting. Some refused to be interviewed, some refused to answer some questions, and others stated either that Reilly was not the person who made the remarks at issue or that they did not know if he made them.

Ultimately, the Company's management decided to rely on Dickinson's version of what he heard and to reject Reilly's denials. Thereupon a decision was made to discharge Reilly. The interview results from the other employees could be viewed as ambiguous inasmuch as many refused to cooperate. Indeed the outcome of the process could have left a reasonable impression that employees were covering up for Reilly.

I therefore reiterate my conclusion that Dickinson and Gilligan, based on Dickinson's report, had an honest, if not particularly reliable opinion, that it was Reilly who, at the meeting on March 7, urged employees to boycott the Right Side Up meeting. Notwithstanding its unreliability, I would nevertheless conclude that the belief was based on facts which could have been construed to link Reilly to statements which, in their essence, admittedly were made by a person or persons at the March 7 meeting. Thus, it is my opinion that the belief asserted is more than a mere assertion of an "honest belief." See *General Telephone Co.*, 251 NLRB 737, 739 (1980), enf'd. 672 F.2d 895 (D.C. Cir. 1981). This, therefore, serves to shift the burden

to the General Counsel to prove that Reilly did not make the remarks attributed to him by Dickinson and I change my mind and find that the Company did not violate the Act by discharging him.

In my earlier decision, I noted that neither the General Counsel, the Charging Party, nor the Respondent called a single witness other than Reilly or Dickinson to testify about what took place at the meeting held on March 7. I originally felt that this was a wash inasmuch as the Respondent could have interviewed employees on this point and presented its own witnesses. On reflection, I have changed my mind.

The fact is that the Company did attempt to interview employees and although some denied that Reilly made the attributed statements, it is significant to me that some refused to be interviewed at all while other employees refused to answer pertinent questions. Thus, the Company's original attempt to interview employees was not particularly successful and there is no reason to believe that it would have had any more success in obtaining voluntary cooperation from employees for the unfair labor practice hearing. (At the same time risking the filing of new charges alleging interrogation.)

In my opinion, counsel for the General Counsel or other Regional office personnel, had a much better chance of obtaining cooperation from some of the more than 80 employees who attended the meeting. After all, NLRB personnel are neutral vis a vis the Company and the Union. The fact that counsel for the General Counsel did not call a single witness to corroborate Reilly's testimony is particularly damaging to his credibility because of the availability of those people and their presumed sympathy to the Union and their shop steward. I simply find it improbable that the General Counsel couldn't find at least one other person who could corroborate Reilly's testimony.

I have concluded above, that the Respondent has presented sufficient credible evidence that it had an honest belief that it was Reilly who urged employees to engage in what would, in effect, be a work stoppage in violation of the collective-bargaining agreement's no-strike clause. Accordingly, as the burden shifts to the General Counsel to prove that Reilly did not engage in this type of conduct, and as I do not now find his denial credible in light of the record as a whole, I shall recommend that the allegations of the complaint that the Respondent suspended and discharged him in violation of Section 8(a)(1) and (3) of the Act be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

It is recommended that the complaint be dismissed in its entirety.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.